

SOUTH AFRICA / JUDGMENT

National Credit Regulator v Self Discovery Cash and Marketing CC (NCT/71714/2016/140(1)) [2017] ZANCT 148 (23 February 2017)

[2017] ZANCT 148

COURT

National Consumer Tribunal

BEFORE

T Waker, A Potwana, X May

CASE / FILE NUMBER

NCT/71714/2016/140(1)

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IN

THE NATIONAL CONSUMER TRIBUNAL

HELD

AT CENTURION

Case

No: NCT/71714/2016/140(1)

In

the matter between:

NATIONAL

CREDIT

REGULATOR

APPLICANT

And

SELF

DISCOVERY CASH AND MARKETING CC

RESPONDENT

Coram: Prof
T Waker
-
(Presiding)
Mr
A Potwana
-
(Member)
Mr
X May
-
(Member)
Date
of Hearing: 23 February 2017, 13 July 2017; 6 Sept 2017 and 30 October
2017

JUDGMENT

AND REASONS

INTRODUCTION

1. The Tribunal is asked to determine whether or not the Respondent is in repeated contravention of the National Credit Act, 2005 (the Act) by:
 - failing to conduct affordability assessments or by failing to maintain documentation in support of affordability assessments;
 - failing to provide pre-agreement statements and quotations in the prescribed form to consumers prior to entering into small credit agreements;
 - failing to provide credit agreements to consumers alternatively failing to provide credit agreements to consumers in the prescribed forms;
 - inducing consumers to enter into supplementary agreements or sign documents that contain provisions that would be unlawful if included in a credit agreement;
 - including unlawful provisions in loan applications (including a provision that allows for the unlawful enforcement of credit agreements, a provision that has the effect of overriding sections 129 and 130 of the Act and a provision that has the effect of the consumer waiving certain common law rights)
 - causing consumers to sign in advance documents relating to the enforcement of the Act;
 - avoiding its obligations in terms of section 129 prior to the enforcement of the Act;

- charging a rate of interest that exceeds the prescribed maximum rate of 5%.
2. For these contraventions the Tribunal is asked to impose certain penalties in terms of the Act on the Respondent including that the Respondent be de-registered as a credit provider and that an administrative fine be imposed on the Respondent.
 3. The matter was first set down for a hearing on 23 February 2017 on a default basis as the Respondent had not filed an answering affidavit. However, the Respondent appeared at the hearing. After consultation it was agreed that the Respondent would be given an opportunity to file its answering affidavit which it was required to do by 16 March
2017. The matter was finally set down for a hearing on 13 July 2017. The hearing commenced with an application by the Applicant to file a supplementary affidavit, the importance of which is discussed below. After hearing the parties on the issue of the supplementary affidavit the Tribunal proceeded to deal with the points in limine raised by the Respondent. It then became clear that there was a substantial dispute of fact between the parties. This dispute of fact was relevant to the point in limine raised by the Respondent that related to the inspection conducted by the Applicant at the Respondent's place of business, and so it was agreed that the matter should be adjourned in order for certain witnesses to be called. The parties indicated that they intended to call the following witnesses:
- Applicant - Mr Avhashoni Ratshitali (Ratshitali) the inspector who conducted the inspection into the Respondent's business practices.
 - Respondent - Ms Josephine Alidzulwi Matsangu - the manager of the Respondent at the time the investigation was conducted and now the sole member of the Respondent; and
 - Ms Thinyadzwini Nancy Makungo - an employee of the Respondent who was present at the time of the inspection.
4. The matter was adjourned to 6 September 2017 when the evidence of the Inspector was led. Shortly before the date of the hearing (1 September 2017) the Respondent requested that the services of an interpreter be provided for its witnesses. In terms of Rule 21 (9) of the Tribunal Rules a party requiring the services of an interpreter must notify the Registrar of the Tribunal at least 10 business days prior to the date on which the matter has been set down. Unfortunately the services of an interpreter could not be procured and so it was decided (after the inspector had given evidence) to postpone the matter to 30 October 2017, notwithstanding non-compliance with the Rules.
 5. At the hearing on 6 September 2017 it became clear that the Respondent only intended to call Ms Makungo as a witness and not Ms Matsangu. The Tribunal therefore decided to call Ms Matsangu as a witness and a subpoena for her attendance at the next hearing was issued by the Tribunal. The matter then proceeded on 30 October 2017.

THE PARTIES

6. The Applicant is the NATIONAL CREDIT REGULATOR ("the NCR"); an organ of state and a juristic person within the public administration, established in terms of Section 12 of the National Credit Act 34 of 2005 ("the NCA"). The NCR has its address at 127 Fifteenth Road, Randjespark, Midrand, ("the Applicant").
7. The Founding Affidavit of the Applicant is deposed to by Ms Jacqueline Boucher, the Manager for Investigation and Enforcement in the employ of the Applicant. At the hearing, the Applicant was represented by Ms

Caroline Young from the NCR.

8. The Respondent is SELF DISCOVERY CASH AND MARKETING CC a registered credit provider in terms of section 40 of the Act, under registration number NCRCP 3228.
9. Respondent has its physical address at NPDC Office 13, Second Floor, Block D, Thohoyandu At the hearing; the Respondent was represented by Advocate Mosomo

JURISDICTION

10. The National Consumer Tribunal ("Tribunal") has jurisdiction to hear this matter and has powers conferred upon it in terms of section 150 of the NCA to make orders in relation to registrant who allegedly

contravenes this Act, or fails to comply with any condition of its registration.

ISSUES TO BE DECIDED

11. The issues to be decided in this matter include whether or not the Respondent has engaged in prohibited conduct by repeatedly contravening the provisions of the Act and the conditions of its registration; and in view of that, should be de-registered as a credit provider and an administrative penalty be imposed by the Tribunal as prayed for by the Applicant.
12. Section 150 provides for Orders of the Tribunal, and reads thus:
"In addition to its other powers in terms of this Act, the Tribunal may make an appropriate order in relation to prohibited or required conduct in terms of this Act, or the Consumer Protection Act, 2008, including-
 - (a) declaring conduct to be prohibited in terms of this Act;
 - (b) ...;
 - (c) imposing an administrative fine in terms of section 151, with or without the addition of any other order in terms of this section"
13. In deciding this question, this Tribunal must first decide the individual underpinning claims by the Applicant regarding:

- (1) Whether or not the Respondent contravened sections 81 and 82 read with section 81(2)(a) (iii), in that no proper affordability

assessments were conducted by the Respondent before granting loans to consumers;

- (2) Whether or not the Respondent contravened Regulation 55(1) (b) (vi) read with section 170 of the Act, in that the Respondent failed to keep proper records of documentation in support of steps taken when conducting affordability assessments in terms of section 81(2) above;
- (3) Whether or not the Respondent contravened section 92 (1) read with Regulation 28(1) (b) of the Act; regarding the failure to provide pre-agreement statements and quotations in the prescribed form to consumers prior to entering into short term credit agreements;
- (4) Whether or not the Respondent contravened section 93 (2) read with section 30 (1) of the Act, by failing to provide credit agreements to consumers alternatively failing to provide credit agreements to consumers which are in the prescribed forms;
- (5) Whether or not the Respondent contravened section 91 (a) read with section 90 (2) (of the Act, by directly or indirectly requiring or inducing consumers to enter into supplementary agreements or to sign documents that contain provisions that would be unlawful if they were included in credit agreements;
- (6) Whether or not the Respondent contravened section 91 (a) read with section 90 (2) (k) (iii) of the Act, by including an unlawful provision in a loan application that allows for the unlawful enforcement of a credit agreement;
- (7) Whether or not the Respondent contravened section 91 (a) read with section 90 (2) (b) (ii) and (iii) of the Act, by including an unlawful provision in a loan application that has the effect of setting aside or overriding section 129 and section 130 of the Act and which avoids a credit providers obligations or duties in terms of the Act;
- (8) Whether or not the Respondent contravened section 91 (a) read with section 90 (2) (c) of the Act, by including an unlawful provision in a loan application which has the effect of a consumer waiving common law rights that may be applicable to credit agreements or that have been prescribed in terms of subsection 90(5) of the Act;
- (9) Whether or not the Respondent contravened section 3 (e) (iii) of the Act by causing consumers to sign in advance, documents relating to the enforcement of credit agreements and in doing so defeating the purpose of the Act;
- (10) Whether or not the Respondent contravened section 129 (1) read with section 130 of the Act, by avoiding its obligations or duties in terms of the Act, which duty is to follow section 129 of the Act prior to debt enforcement; and
- (11) Whether or not the Respondent contravened section 101 (1) (d) (ii) read with Regulation 42 (1) of the Act, by charging a rate of interest that exceeds the prescribed maximum rate of 5% per month for a maximum of six (6) months for short term credit agreements.

14. Further, the Tribunal is tasked to decide on the technical legal points raised in limine by the Respondent. These preliminary points will be dealt with later in the course of this judgment.

BRIEF BACKGROUND FACTS

15. On 31 August 2015, the Applicant initiated a complaint in terms of section 136 (1) of the NCA against the Respondent following a complaint from a consumer, Mr Nemadodzi.[1] (Nemadodzi). Nemadodzi alleged that he had been granted a loan by the Respondent and that the Respondent was overcharging on interest. He also alleged that a judgment had been obtained against him without his consent or knowledge and that his salary was now subject to an emoluments attachment order (EAO) which had also been obtained without his knowledge.
16. The Applicant appointed an inspector in terms of section 25 of the NCA to investigate the activities of the Respondent.
17. In its founding affidavit, the Applicant states that the investigation was initiated by the Applicant following a complaint submitted to it by Summit Financial Wellbeing on behalf of a Mr S Nemadodzi (Nemadodzi) against the Respondent. Attached to the founding affidavit is the Form 29,[2] a complaint initiation form that is used for the purposes of initiating a complaint to the Applicant in terms of section 136 of the Act. The name of the complainant is Nemadodzi. The form is signed by a call centre operator, Magwaza, which indicates that the complaint was initiated by a telephone call. The importance of this will be discussed further below.
18. The investigation was conducted on 1 September 2015. During the investigation, the Applicant concluded that the Respondent was in

repeated contravention of the provisions of the Act, thereby committing conduct prohibited by the Act. A report on the investigation carried out by the Applicant was compiled by the inspector. [3]

THE APPLICANT'S FOUNDING AFFIDAVIT

19. According to the Applicant, the Respondent has repeatedly failed to conduct its business in a manner that is consistent with the purpose and requirements of the Act. In that regard, the Applicant asserts that the Respondent has exhibited serious contraventions of the Act, as shown in the Applicant's investigation report.

THE RESPONDENT'S ANSWERING AFFIDAVIT

20. In response to the allegations levelled against it, the Respondent raises the following points in limine:

- (1) that the bulk of the evidence presented by the Applicant represents inadmissible hearsay evidence and/or evidence obtained in an unlawful manner in that the Applicant came into possession of certain documentation without following due process. This is because the Applicant conducted a search of the premises of the Respondent without complying with the provision of section 139
- (4) and 153 to 155 of the NCA. Such inadmissible evidence should therefore be struck from the Applicant's founding affidavit.
- (2) that the lodging of the complaint by Summit Financial Wellbeing (Summit) on behalf of Nemadodzi was irregular unless there had been compliance with Regulations 50 (4) and 50 (5) of the Regulations. There is no allegation or indication in the Applicant's founding affidavit to show compliance with the Regulations and the Respondent called upon the Applicant to prove compliance with these Regulations.
21. The Respondent denies the allegations made by the Applicant in its founding affidavit on the basis that the evidence obtained by the Applicant constitutes inadmissible evidence that was obtained in an unlawful manner. The Respondent submits that the Applicant's application fails to furnish any admissible evidence that shows noncompliance by the Respondent with the Act and/or any wrongdoing. The Respondent submits that the Application is based on conjecture and/or speculation and inadmissible evidence
22. These points were reiterated at the hearings where the Respondent stated that it would only deal with the points in limine and would not be contesting any of the issues relating to the merits raised by the Applicant.
23. The Respondent submits that due to a lack of evidence that the Respondent has contravened the Act, the Applicant is not entitled to the relief that it is seeking.

APPLICANT'S RESPONSE TO THE POINTS IN LIM/NE

24. In order to deal with the initiation of the complaint the Applicant filed a supplementary affidavit stating that:
 - After reading the Respondent's answering affidavit, deposed to by Ms Matsangu, the Applicant realised that; through its error; certain facts had not been properly canvassed and/or sufficiently elaborated on; which led to confusion regarding the sequence of events that led to the investigation.
 - Initially a complaint was received via email from Summit by the Applicant's complaints department without a Form 29 attached or a Power of Attorney from the complainant. Summit subsequently sent through a Form 29, but due to a lack of a power of attorney; the Applicant did not proceed to initiate a complaint based on this complaint. This Form 29 is attached to the supplementary affidavit and is marked CY1.

· On the same day a telephonic complaint was lodged by the consumer as evidenced by the Form 29 marked annexure FA3 of the application. The complaint was from Nemadodzi, the same consumer referred by Summit and the Applicant was then in a position to launch an investigation.

· Regulation 50 (1) (b) of the Act allows for consumers to lodge complaints against credit providers by contacting the Applicant telephonically. No further requirements are set out in the Regulations and the call centre agent's signature is testimony to the fact that there was a complaint by the consumer.

25. A confirmatory affidavit, attested to by the call centre agent Mudua is attached to the supplementary affidavit.

26. The Applicant states that it is unable to file a confirmatory affidavit from the consumer because he has passed away. This fact was later confirmed in evidence given by the Respondent's employee, Ms Makungo.

27. The Applicant denies

· That the evidence obtained by the inspector was obtained unlawfully and that the inspector was required to comply with section 155 (3) of the Act; and

· that any search was conducted on the premises therefore no warrant was required before the inspector was entitled to enter the premises.

28. The Applicant argues that:

· The inspector was authorised to conduct the investigation in terms of section 25 of the Act; and

· in terms of its registration requirements under section 50 (2) of the Act a registrant must permit the Applicant or any person authorised by the Applicant to enter any premises to conduct reasonable enquiries for compliance purpose including any act contemplated in section 145 (1) (d)- (h) of the Act.

29. According to the Applicant, nothing was seized from the Respondent's premises, requiring the execution of a warrant, and the Respondent's employee cooperated with the Applicant after the section 25 certificate was shown to the employee.

30. The Applicant contends that the Respondent's reliance on the need for a search and seizure warrant is misplaced and that the Tribunal must dismiss this assertion by the Respondent.

THE HEARINGS

31. Although the Respondent did not oppose the Applicant's submission of a supplementary affidavit it argued that the Tribunal needs to exercise its discretion whether or not to grant the application and to make a decision accordingly.

32. The Respondent re-iterated its position that the Applicant's inspector had conducted a search of the Respondent's premises and that it was therefore required to have a warrant. Without such a warrant, the evidence was obtained unlawfully and should be disregarded. Without this evidence, there is no evidence that the Respondent has contravened the Act and the application should therefore be dismissed.
33. The Applicant denied that its inspector had conducted a search of the Respondent's premises and argued that the Applicant may enter premises to make reasonable enquiries for compliance purposes. The purpose of the investigation, the making of copies of documentation and the making of enquires was to determine whether the Respondent is complying with the Act.
34. The Applicant argued that its inspector did not conduct himself outside the scope of section 50 (2) (a) read with section 25 during the investigation.
35. Both parties conceded that there was a clear dispute of fact regarding the nature of the investigation that took place at the Respondent's business premises and therefore it was agreed that it was necessary to call the various parties who were present on the day.
36. Initially it was agreed that three witnesses should be called. These were
- Mr Ratshitali the inspector who conducted the inspection into the Respondent's business practices;
 - Ms Matsangu - the manager of the Respondent at the time the investigation was conducted and now the sole member of the Respondent; and
 - Ms Makungo - an employee of the Respondent who was present at the time of the inspection.
37. At the hearing held on 6 September 2017, when it became obvious the Ms Matsangu did not intend to give evidence, the Tribunal decided to subpoena her as she is the sole member of the Respondent at present.

THE EVIDENCE OF THE WITNESSES

Mr Ratshatali

38. In his investigation report the details regarding the actual investigation conducted at the premises of the Respondent are rather sketchy. Mr Ratshatali stated:

"On the 01-09-2015 at about 09h00 I (Kenneth Ratshali) visited office of Self-Discovery and Marketing CC and found a lady who introduces herself to me as Nancy Mukwevho.[4] The Manager (Josephine Matsangu) was traced at local primary school where she works as an Educator. She was not cooperating and evasive when asked about the operation of the entity. She then left the office to another office leaving me with Nancy Mukwevho who has no knowledge of the National Credit Regulator and NGA.

Self-Discovery and Marketing CC was requested to provide a sample of 10 consumer files to enable an assessment of compliance with the Act in line with the mandates of the investigation. I reviewed ten credit agreements.[5]

39. In his evidence Mr Ratshatali provided further details regarding the investigation:

When I arrived at the premises, I found a lady by the name of Nancy (Makungo). She was alone in a small office. And I asked her about the owner of the business, of the manager. She told me that the owner - the manager is working at a primary school around that area.

I then requested the telephone number of the owner. I tried to phone her. The phone ring unanswered. And then, because I know the primary school, I drove there, and then went to the school administrator's office and requested to see her. When she came I identified myself to her and then show her my Section 25 Certificate, also my appointment card, and tell her the reason why I was looking for her. Then she said to me the school will be off at around 2, so can we meet in her office. Then I went back to the office and wait for her.

When she arrived, she came with two gentlemen that were unknown to me. Then I requested the two gentlemen to leave the office so that I can interview her together the employee, Nancy.

When I was busy reading her her rights, she left the office to the place next door, which was used as a storeroom for their files. Then I called her back to say I'm still busy reading you your rights, and explain the reason why I'm in your office. She said I can continue with referring to the (intervention) as well.

She started displaying a very negative attitude towards me, and then instead of coming back she started engaging the two gentlemen that I had requested them to leave the office that we were in to conduct the interview. Then I interviewed the lady who was not even aware what NCR stand for, or the kind of work that NCR do. From there I requested ten samples of the fines after I had explained the reason of my visit and the complaint, where the complaint come from, and specifically I requested a file of Mr Nemadonzi who was one of the Applicant there.

40. Mr Ratshatali explained that when Ms Matsangu heard him request the file of Nemadodzi, she came back to the office and asked why he was requesting the file of a person who has 'already passed on?' He explained that he was there to do an investigation as there was a complaint in the matter and Ms Matsangu gave him the file.

41. He also stated that he requested nine other sample files, which were given to him, but under cross- examination he explained that the files were on an open table and he randomly selected files from the table. He then requested to take the files out of the office to the nearest internet cafe so that he could make copies. He stated that Ms Matsangu agreed to this. He also requested that Ms Makungo accompany him to make the copies but Ms Matsangu stated that she had to remain in the office. He then went to the nearest internet cafe to make the copies. He explained that although the Respondent had a photocopy machine it was a small one and they were complaining about the stationary. He made the copies and returned the files to the office.

Ms Makungo

42. Ms Makungo testified that during September 2015 the inspector visited the business premises of the Respondent where she was working at around 9 am. When he arrived, he showed her a card which had names on it indicating where he came from. He informed her that he had come in connection with the case of Nemadodzi. She informed him that Nemadodzi had passed away. He went into one of the other offices and when he returned he stated that he wanted 10 files to examine. He took six files himself off an open shelf and asked her for four more which she gave to him. The files were on an open shelf in the reception area that the inspector could see for himself. He told her that he wanted to make copies of the files and that he would take the files to the Plaza to do this because they were big and would use up a lot of ink. She stated that the photocopy machine was working. He asked her about her employer and she said that her employer was at work. He then left and returned between 3 and 4pm with the files. Her employer arrived at the office at 2pm.
43. Ms Makungo was asked about whether or not the inspector made a list of the files before he took them and she replied that she did not see. She was also asked whether the inspector had given her of option to give him the files or not and her response was:

"Because he came there, I did not know what to do so I just give it (the files) to him, the four files because that was what her wanted."

44. In answer to a question from the Applicant regarding whether or not he did anything to scare her or intimidate her Ms Makungo answered "no".[6] He did not raise his voice nor did he shout at her. She did however state that she was scared because it was someone from the NCR. Her response was:

I thought it was someone "who was the law" and "who knows how the law works".

45. In response to certain questions from the Tribunal, Ms Makungo explained that her role in the business was to give money to consumers. She works alone in an office (there are two other people in another office). She is in charge of the office. Her employer (Ms Matsangu) comes once, twice or three times per week to the office and sometimes does not come at all for a whole week.
46. The Tribunal also asked Ms Makungo questions regarding her understanding of the role of the NCR and the NCA and it was clear from her answers that she has very limited knowledge of either.
47. She testified that she gives consumers money (R2 500) and then they sign forms. The business charges an interest rate of 15.5% per month. When clients cannot pay their instalments she swipes their cards, which they provide and if they cannot pay they are issued with a letter of demand and then they get a court order. In answer to a question regarding her knowledge of English she replied "so-so".

Ms Matsangu

48. Ms Matsangu testified that she was the manager of the business at the time of the inspection but that she is now the owner. (She did not understand the concept of being a member of a close corporation). She bought the business from her son and daughter who reside in Gauteng. She did not know how much money she paid for the business or when it was exactly that she took over as owner. At the time when her children owned the business they used to visit twice a year during holidays. She works at a school as a teacher from 7am until 2pm every day and the hours of the business are from 7.30am to 4.30pm. Ms Makungo runs the business while she is at school. She described Ms Makungo as a clerk and stated that there are three clerks in the business with Ms Makungo as the main clerk.
49. She testified that the inspector came to the school with files at about 12pm and she told him to meet her at the business at 2pm. He arrived at about 3pm and did not speak to her, he just put the files back and left.
50. In response to a question regarding her responsibilities when the Regulator arrives, she answered "I do not know". Ms Matsangu appears to have minimal knowledge about the Regulator and the NCA.
51. When asked about the amount of interest which the business charges consumers she stated that they charge 5% per year and when questioned about the 15.5% as testified by Ms Makungo she replied that she "did not know". She also testified that she had not given Ms Makungo any training regarding the NCA and that she had not really read the documents which consumers are asked to sign, only "a little bit".
52. She explained that if people do not pay back the money they are taken to lawyers.
53. Ms Matsangu testified that the inspector received the file of the consumer Nemadodzi from Ms Makungo.

APPLICABLE SECTIONS OF THE NCA TO THE FACTS AND TRIBUNAL'S FINDINGS

54. The Respondent raised two points which can be regarded as points in limine:
 - (a) There was no proper initiation of the complaint; and
 - (b) The Applicant conducted a search of the Respondent's business premises and seized certain documents and as such it should have first obtained a search and seizure warrant. Without such a warrant its actions were unlawful.

No proper initiation of the complaint

55. Section 136 (1) of the Act provides that any person may submit a complaint concerning an alleged contravention of the Act to the Applicant in the prescribed manner and form.
56. Section 136 (1) must be read with Regulation 50 which deals with initiating a complaint to the Applicant. A complainant may lodge a complaint personally or a third party may lodge a complaint on behalf of a consumer and various means may be used for lodging such complaints. Regulation 50 (1) (b) provides that a consumer may lodge a complaint by

contacting the Applicant telephonically. However, where the telephone is relied upon for lodging the complaint, the complaint must be lodged by the complainant only, and not by another person acting on behalf of the complainant (Reg 50 (3)).

57. Where a third party lodges a complaint on behalf of a complainant by completing and submitting Form 29 on behalf of the complainant via fax, mail or email, the complaint must be accompanied by a written consent signed by the complainant in writing. Such written consent must contain certain specified information.
58. In this particular matter, it is not disputed that the initial complaint was made by Summit on behalf of the consumer and this was not accompanied by the consumer's written consent.
59. However, as explained in the supplementary affidavit, the Applicant also received a telephonic complaint from the consumer himself. This was confirmed in the confirmatory affidavit attested to by the call centre operator.
60. Although the Applicant's founding affidavit is sloppy in its construction, the Applicant is not changing its original affidavit because the Form 29 that was completed by the call centre operator (when he received the telephonic complaint from the consumer) is attached to the founding affidavit and not the Form 29 completed by Summit.
61. The Tribunal is therefore of the view that leave to file the supplementary affidavit should be granted and that based on the evidence before the Tribunal, there was a properly initiated complaint to the Applicant from a consumer.

The need for a warrant of search and seizure

62. For the purposes of this judgment, the relevant sections of the Act which the Tribunal must consider are section 50(2) (a), which applies when a reasonable inquiry is being conducted for compliance purposes and sections 153, 154 and 155 which provides for specific powers when business premises are being searched and documents seized.
63. In terms of section 50 (2) (a) a registrant is obliged to permit the NCR or any person authorised by the NCR to enter the premises where the registrant conducts its business in order to conduct a reasonable inquiry for compliance purposes.
64. The wording of section 50 (2) extends to actions that may be performed by referring to section 154(1) (d) to (h). Section 154 (1)
 - (d) to (h) permits the inspector to:
 - (a) Examine any articles on the premises;
 - (b) Request information about the article;
 - (c) Take extracts from, or make copies of any books and documents in or on the premises;

- (d) Use any computer system on the premises to search for information and reproduce record from data), and;
 - (e) Seize any output from that computer for examination and copying.
65. It appears from the simple and ordinary reading of this section (s
- 50) that a warrant may not be needed provided the inspector's keeps his actions within the ambit of the permitted activities. This section deliberately excludes sub-clause (i) of the list of actions to be performed by the inspector. Sub-clause (i) states: "attach and if necessary. remove from the premises for examination and safekeeping anything that has a bearing on the investigation". It follows therefore that a warrant would be a requirement in order to perform the action listed under (i).
66. The critical issue which the Tribunal must decide is whether or not the inspector merely conducted reasonable inquiries for compliance purposes or whether his conduct went beyond this and he conducted a search of the premises and attached documents.
67. The Applicant submits that when conducting the investigation, it complied with section 154 (1) (d) to (h) as well as sections 50 (2)
- (a) read together with section 25. In terms of section 154 (1) (c) the inspector is entitled to take extracts from or make copies of any books and documents that are in the premises.
68. The plain and ordinary wording of section 50(2)(a) of the Act conveys to a person authorised by the NCR, the authority to enter the business premises of a registrant and perform certain functions which a person would ordinarily do in terms of a warrant under sections 153 and 154. However a person authorised to enter in terms of section 50(2) (a) may not search the premises or any person on the premises. if that person is not authorised in terms of a warrant, to do so.
69. In considering the spirit and intent of the wording of section 50(2), which refers to a reasonable inquiry (and not a search) being conducted, it is very clear that the legislature did not intend a search to occur. Specifically so because the word "search" does not appear anywhere where that inquiry is the issue. Compared to the wording of section 154 that provides specific powers for the searching of a premises and a person, section 50(2) conveys a very different intent, authority and action to be performed.
70. It must be accepted that the evidence presented by the various witnesses was not very satisfactory and there are inconsistencies in their various versions of what occurred during the investigation. However from these rather garbled versions it is possible to extract a version which is common cause.
71. It is common cause that the inspector went to the Respondent's business premises and entered them without facing any opposition. At that stage the person who was in charge of the premises was Ms Makungo and, from the evidence before the Tribunal, it is clear that she is the person who is in charge of the everyday running of this business. She did not stop

the inspector from entering the premises and in terms of section 50 the registrant is obliged to allow the NCR to enter in order to conduct a reasonable inquiry. The Tribunal accepts from the evidence before it that the Section 25 certificate was shown to the Respondent. This was confirmed by Ms Makungo herself in her evidence.

72. In her answering affidavit Ms Matsangu stated that the inspector intimidated Ms Makungo but this was not borne out by the evidence before the Tribunal. Ms Makungo stated that he did not shout at her and it appears from the evidence that his conduct was perfectly reasonable. Ms Makungo did state in her evidence that she was scared because he was from the NCR and he was someone who knew the law. Given Ms Makungo's lack of understanding regarding the role of the NCR and the Act, it is not surprising that she was somewhat nervous. Her nervousness had nothing to do with the conduct of the inspector.
73. Advocate Mosomo argued that the inspector did not contact the owner of the business notwithstanding that he was informed as to who the owner was. He also argued that at the time of the inspection Ms Matsangu was not the owner of the business nor was she a member of the Respondent. This would have entailed the inspector having to contact the members of the Respondent who were in Gauteng. Section 50 does not require consent from the owner of the business before entering and indeed a registrant (in this case the Respondent) must allow the inspector to enter the premises for the purposes of conducting reasonable enquiries. The inspector can then request information from the owner or person in control of the premises about any article or document. In this case, Ms Makungo was the person who was in charge of the premises at the time that he entered the premises.
74. In this regard, the observations made by *Sachs J in Mistry v Interim Medical and Dental Council of South Africa & Others*[7] are relevant.

"[I]n the case of any regulated enterprise, the proprietor's expectation of privacy with respect to the premises, equipment, materials and records, must be attenuated by the obligation to comply with reasonable regulations and to tolerate the administrative inspections that are an inseparable part of the effective regime of regulation".

75. Regardless of whether the inspector took the files in the morning when he saw Ms Makungo (which is Ms Makungo and Ms Matsangu's version) or in the afternoon after meeting with Ms Matsangu, (the inspector's version) it is common cause that he took 10 files away in order to photocopy their contents. The Tribunal accepts that in all likelihood he was given some of the files by Ms Makungo and that he randomly selected some files from piles which were on an open shelf in the front office.
76. The question which must be asked is whether the inspector's conduct went beyond mere reasonable inquiries (as permitted by section 50 and as extended by section 154 (1) (d) to (h)) and actually conducted a search of the premises and seized documents.

77. The Act does not define what constitutes a search and so an element of common sense must apply. Did the inspector search the premises for documents and information? In our view he did not. According to the evidence of both Ms Makungo and the inspector, consumer files were in plain view in the reception area of the premises. The inspector randomly selected some files and he was given others by Ms Makungo. On Ms Makungo's version he selected six and requested four from her which she gave to him. This cannot be regarded as a search of the premises. Much was made of the fact that the inspector managed to get hold of the specific complainant's (Nemadodzi) files. Adv Mosoma, on behalf of the Respondent, argued that it was highly unlikely that the inspector would quite fortuitously have picked the right file and

therefore he must have searched for it. However this is not borne out by the evidence as none of the witnesses stated that any search had been carried out. Ms Makungo stated the Ms Matsangu gave the file to the inspector whilst Ms Matsangu stated that Ms Makungo gave the file to the inspector. Since there is no evidence to suggest that the inspector actually went looking for a specific file it is reasonable to accept that either Ms Makungo or Ms Matsangu handed Nemadodzi's file over to the inspector.

78. The only issue that is of concern to the Tribunal is the fact that the inspector removed the files from the premises in order to make copies of them. Did this constitute a seizure of information for which a warrant is required? The Applicant, in its heads of argument referred to the case of *Ntoyakhe v Minister of Safety and Security*[8] where the court held that the word 'seize' encompasses not only the act of taking possession of an article but also the subsequent

detention thereof otherwise the right to seize would be rendered worthless.

79. In this particular instance, the inspector took the documents for the purposes of making copies. This is permitted in terms of section 50
- (1) (c) of the Act. The Act does not specify that the copies must be made on the business premises of the registrant. The inspector was perhaps opening himself up to a claim that he had removed certain relevant documents but in this instance there is no suggestion that any documents went missing and there is no reason for the Tribunal to believe that not all the documents were returned to the Respondent. Therefore no documents were seized by the Applicant.
80. The Tribunal finds therefore that the conduct of the inspector fell within the ambit of section 50 (2) (a) read with section 25 and section 154 (1) (d) to (h) and that accordingly the inspector did not need a warrant to enter the premises and make copies of the documents. The documents were not therefore unlawfully obtained and may be considered by the Tribunal.

81. However, even if the Tribunal is incorrect in its finding that the documents were lawfully obtained, there is still the evidence of Ms M Matsangu and Ms Makungo to consider. As agents of the Registrant, their lack of knowledge of the role of the NCR and the Act is extremely concerning.[9] Ms Matsangu refers to herself as the owner of the business, but she is at school teaching for most of the day and spends very little time in the business.
82. It must be accepted from the evidence before the Tribunal that the person primarily responsible for running the business is Ms Makungo and she states that she has had no training regarding the NCA at all.
83. Both parties required the services of an interpreter and yet they rely on complicated legal documents that consumers are required to sign and which are in English. They both admitted that they had not really read the documents. Therefore, it must be accepted that they are not explaining any of these documents to consumers when they are asked to sign them.
84. In addition, Ms Makungo admitted that they charge consumers 15.5% interest per month. The Tribunal would be failing in its obligations if it were to ignore this evidence and allow the status quo to continue. This investigation took place in 2015 and so the parties have had ample opportunity to correct their lack of knowledge about the NCR and the Act. It is clear from their oral evidence that they have not done this. In particular Ms Makungo admitted that the Respondent charges 15.5% interest per month which far exceeds the maximum of 5% for a six month period for short term credit agreements. Given the fact that Ms Makungo informed the Tribunal that she gives consumers loans of R2 500 it is assumed that these are short term credit agreements although it is difficult to establish from the documents what type of loans these are because the documents have not been properly completed by consumers.
85. The documents also suggest that consumers are obliged to repay the loan in a lump sum as they read as follows:

I undertake to pay the lump sum of R being the capital debt, interest and administration fees on or before the day of 20

86. It must be noted that the blanks have not always been completed[10] but then, even more disturbing, the loan agreement goes on to state that:

In the event that I fail or default in making payment on the date given above (where no date has actually been filled in), which I will be all means avoid occurring, then I consent to the granting of judgment against me and issuing of emoluments attachment order for purposes of making payment in terms of the schedule of payment agreement below.[11]

87. There is evidence before the Tribunal that consumers sign undated letters of demand and consent to judgment forms which are also undated. There were also consumer files which contained emoluments attachment orders.[12]

88. Advocate Mosoma indicated at the outset that he was challenging the admissibility of the evidence before the Tribunal and would not be dealing with the actual allegations of prohibited conduct itself. In her founding affidavit, Ms Matsangu relied purely on the fact that the evidence was inadmissible and for the most part simply denied the allegations made by the Applicant without counteracting them in any meaningful fashion.
89. Having accepted that the documents were obtained lawfully, the Tribunal is now faced with evidence that has not been contradicted by the Respondent. Some of this evidence is further supported by the evidence provided by Ms Matsangu and Ms Makungo.

CONTRAVENTIONS OF THE ACT

Affordability assessments

90. The Applicant alleges that the Respondent fails to conduct a proper affordability assessment prior to the granting of a loan. There was no evidence of credit bureau reports and no evidence that the Respondent takes reasonable steps to assess the consumer's existing financial means, prospects and obligations. It is noted that in some of the files there are salary slips and bank statement but there is evidence before the Tribunal that consumers sign blank documents which are supposed to contain financial information. In addition section 81 requires the credit provider to take steps to ensure that the proposed consumer has a general understanding and appreciation of the risks and costs of the proposed credit and of his or her rights and obligations under the credit agreement. Given the fact that Ms Makungo admitted that she is unaware of her obligations under the legislation, it may be assumed that she is not explaining anything to consumers. The documents are for the most part in English and by her own admission, Ms Makungo is not proficient in English. The documents

also contain complicated legal language such as "beneficial ordinis sue excursionist et divisions" "non cause debt"

"error calculi and revision account". It is highly unlikely that these terms are explained to consumers given Ms Makungo's

explanation regarding her knowledge of her responsibilities under the NCA. Ms Makungo also stated that many consumers ask her to complete the documents for them but that she tells them to complete the documents for themselves. Taking all this into account it is clear to the Tribunal that both the agents of the Respondent and consumers are unaware of what is contained in the documents that consumers are required to sign.

91. The Tribunal finds therefore that the Respondent has contravened section 81 and 82 and that no proper affordability assessments are conducted by the Respondent before granting loans to consumers. Given the fact that the Tribunal has found that no proper affordability assessments were done it is not necessary to make a finding on the alternative charge of failing to keep proper records (i.e. a contravention of Regulation 55(1) (b) (vi) read with section 170 of the Act).

Pre-Agreement statements and quotations

92 There is evidence before the Tribunal that whilst the Respondent has documents headed pre-agreement statements and quotations, these documents are not completed and consumers are for the most part signing blank forms. The Respondent is therefore found to have contravened section 92 (1) read with Regulation 28(1) (b) of the Act.

Credit Agreements

93. The Applicant alleges that the Respondent contravened section 93 (2) read with section Regulation 30 (1) of the Act, by failing to provide credit agreements to consumers alternatively failing to provide credit agreements to consumers that are in the prescribed forms. The Respondent has denied this allegation. The evidence before the Tribunal establishes that consumers do sign a document head "Loan Application" which appears to contain much of the information

which is required in terms of Regulation 30 (1) of the Act. Form 20.2 is the form which is prescribed for small credit agreements. However again these forms have, to a large extent, not been completed by consumers and are signed whilst significant information has not been recorded and the documents contain blank spaces. The Tribunal finds therefore that the Respondent has contravened section 93 (2) read with Regulation 30 (1) of the Act.

Unlawful provisions

94. The evidence establishes the consumers sign documents that contain provisions that are unlawful under the Act. These provisions deprive consumers of their rights under the Act and they enable the credit provider to avoid their duties under the Act. For example, the loan application states that if the consumer fails to comply with all or any of the terms and conditions of the agreement, the full amount of the debt will be immediately payable and recoverable without any further notice whatsoever. Such a clause purports to allow the credit provider to recover the debt without having to follow the procedures set out in the Act. As discussed above, consumers also consent to the granting of judgment and to the issuing of an Emoluments attachment order when they sign the loan agreement. This is a contravention of section 90 (2) (k) (iii). The Respondent is therefore found to have contravened section 91 (a) read with section 90 (2).

Fraudulent practices

95. The Applicant alleges that the Respondent causes consumers to sign in advance, documents relating to the enforcement of credit agreements and in doing so defeating the purpose of the Act. This it alleges is

a contravention of section 3 (e) (iii) of the Act. Section 3 of the Act deals with the purpose of the Act one of which is to protect

consumers from fraudulent practices. In our view it would be preferable for the Applicant to have identified the particular sections of the Act which the Respondent has contravened and which talk to fraudulent practices. It is however extremely concerning that

there is evidence before the Tribunal that consumers sign in advance documents which purport to allow the Respondent to proceed to take legal action and obtain emoluments attachment orders without first going through the correct legal procedures as set out in section 129(1) read with section 130. Therefore no specific finding with regard to prohibited conduct is made in relation to a contravention of section 3. However the Respondent is found to have contravened section 129 (1) read with section 130 of the Act, by ensuring that consumers sign documents in advance at the time when they apply for their loans. The evidence given by both Ms Matsangu and Ms Makungo clearly demonstrates that they were unaware of any legal process that had to be followed before legal action could commence against defaulting consumers.

Charging of Interest

96. Based on both the evidence obtained by the inspector and the evidence of Ms Makungo, it is clear that the Respondent is charging an interest rate of 15.5% per month. This is in contravention of section 101
- (1) (d) (ii) read with Regulation 42 (1) of the Act as it exceeds the prescribed maximum rate of 5% per month for six months for short term credit agreements.

CONCLUSION

97. For the reasons set out above, the Respondent is found to have engaged in prohibited conduct in that it has contravened the following sections of the NCA:
- i. Sections 81 and 82 by failing to conducting proper affordability assessments and to ensure that consumers fully understand their credit agreements;
 - ii. Section 92 (1) read with Regulation 28 (1) (b) by failing to provide pre-agreement disclosures;
 - iii. Section 93 (2) read with section Regulation 30 (1) by failing to provide credit agreements to consumers which are in the prescribed forms;
 - iv. Section 91 (a) read with section 90 (2) by including unlawful provisions in the credit agreements;

- v. Section 129 (1) read with section 130 by failing to follow proper procedures for debt enforcement; and
- vi. Section 101 (1) (d) (ii) read with regulation 42 (1) by charging consumers interest in excess of that permitted in terms of the NCA.

98. The Respondent is also found to have repeatedly contravened the NCA.

CONSIDERATION OF AN APPROPRIATE ORDER

99. In addition to finding that the Respondent has been in repeated contravention of the Act the Applicant requests that the following orders be made:

- (1) The Respondent's registration as a credit provider with the Applicant be cancelled in terms of section 150 (g) of the Act;
- (2) An administrative fine in the amount of R1 000 000.00 or 10% of its annual turnover be imposed on the Respondent (whichever is the greater);
- (3) The Respondent be ordered:
 - (a) Within 30 days to appoint an independent auditor at its own costs. Said auditor must determine and compile a list of all past and present consumers who have been overcharged interest rates that exceed the prescribed minimum rates and by how much these consumers have been overcharged by the Respondent;
 - (b) To refund the amounts which it has overcharged consumers within 30 days from the date of the auditor's report;
 - (c) Once the refunds have been made to provide a written report to the Applicant detailing the identity of the consumers and the refunds that have been made. This report must be provided to the Applicant within 120 days after the order has been made; and
 - (d) To pay any funds intended for consumers who the Respondent cannot trace into a trust account held by the auditors.

Deregistration of the Respondent

100. In view of the severity of the prohibited conduct as well as the lack of knowledge of the Respondent's employees regarding the NCA and their responsibilities under the Act, the Tribunals deems it appropriate that the Respondent's registration as a credit provider be cancelled

Consideration of an administrative fine

101. The Applicant has requested the Tribunal to impose a fine on the Respondent and has submitted some arguments on the factors listed in section 151 of the NCA that the Tribunal must consider.

101 Considering the nature of the contraventions and the importance of this issue for consumers the Tribunal regards a fine as appropriate and justified. The NCA was specifically introduced to deal with the abuses which have been perpetrated by the Respondent. A clear message must be sent that non-compliance with the NCA will not be condoned or tolerated.

102 The nature, duration, gravity and extent of the contravention;

The approach used by the Respondent as set out above appears to be an ongoing and common practice. Although the investigation was conducted in 2015, it appears from the evidence that no attempt has been made by the Respondent to improve its business practices and to ensure that it now complies with the legislation. The contraventions of the NCA are extremely serious and appear to go to the heart of the Respondent's business practices. The Respondent's employees are oblivious to their responsibilities under the Act and appear to be using business practices and documents that they themselves do not understand.

103 Any loss or damage suffered as a result of the contraventions;

No specific evidence was provided in this regard but as the Respondent has been charging an interest rate that exceeds that which is permitted under the legislation it is reasonably expected that many consumers have and continue to suffer loss. As no proper assessments are conducted, it can be assumed that consumers entered into loans that they may not be able to afford and also suffer as a result of EAOs being obtained against their salaries when they were unable to repay the loans.

104 The behaviour of the Respondent;

The inspector stated that the manager and now the owner of the Respondent (Ms Matsangu) refused to co-operate when he conducted his investigation. The demeanour of Ms Matsangu also left much to be desired when she gave evidence and she had to be reminded by the Tribunal that as a registrant she had a duty to co-operate with the NCR.

105 The market circumstances in which the contravention took place:

No specific evidence was provided to the Tribunal but the NCA was expressly introduced to deal with the abuses which are being perpetrated by the Respondent. It appears that the Respondent has simply ignored the NCA and has continued with many practices that

were common in the credit market before the NCA was introduced. The fact that many consumers request Ms Makungo to complete the documents for them is an indication that they do not understand these documents and are unable to complete them properly for themselves. Ms Makungo also does not understand the documents, the signing of which has serious consequences for consumers. All of this is not explained to consumers. The Respondent is clearly taking advantage of their lack of knowledge and understanding.

106 The level of profit derived from the contravention;

No specific evidence was provided in this regard, but the Respondent must derive significant profit from overcharging consumers interest on their loans.

107 The degree to which the Respondent has co-operated with the Commission and the Tribunal:

Based on the Applicant's submissions the Respondent did not cooperate with its investigator.

108 Whether the Respondent has previously been found in contravention of this Act.

The Applicant has submitted that there has been no previous investigation or finding against the Respondent.

109 The Applicant did not submit any evidence of the turnover of the Respondent. The Tribunal can still impose a fine but is then limited to a maximum fine of R1 000 000.00.

110 Although the Respondent appears to be a very small credit provider with only a single member (owner) and three employees, the NCA was specifically introduced to protect vulnerable consumers and to ensure that credit providers act in a fair manner at all times. A strong message must be sent that all credit providers, even small businesses, cannot escape the peremptory provisions of the NGA. They and their employees must ensure that they understand the provisions of the NCA and that they act in accordance with its provisions.

111 As the credit provider is a small business, an administrative penalty of R100 000.00 is appropriate under the circumstances.

Appointment of an auditor

112. Although only a small sample of consumer files were examined by the inspector, Ms Makungo confirmed that the Respondent is charging an interest rate that exceeds the amount permitted in the Act. From the evidence before the Tribunal it is not possible to establish how wide spread this practice is and whether the Respondent only provides short term credit agreements. The appointment of an auditor to assess the situation and to establish whether and by how much consumers have been over-charged is appropriate.

ORDER

112 Accordingly, the Tribunal makes the following order:

- (1) The Respondent's registration as a credit provider is hereby cancelled with immediate effect;
- (2) The Respondent is to pay an administrative fine of R100 000.00 (One hundred Thousand Rand) into the National Revenue Fund referred to in section 213 of the Constitution within 30 business days of the date of this judgment;
- (3) The Respondent is also ordered:

- (a) Within 30 days to appoint an independent auditor at its own costs. Said auditor must determine and compile a list of all past and present consumers who have been charged interest rates that exceed the prescribed minimum rates and by how much these consumers have been overcharged by the Respondent;
- (c) To provide a written report to the Applicant detailing the identity of the consumers and the refunds that have been made and the details regarding attempts it has made regarding all the consumers it cannot trace. This report must be provided to the Applicant within 120 days after receiving the auditors' report; and
- (4) No order is made as to costs.

Thus done and handed down on this 9th day of January 2018.

[signed)

PROF TA WOKER PRESIDING MEMBER

Mr A Potswana (Member) and Mr X May (Member), concurring

- [1] See FA4 of the Founding Affidavit.
- [2] See annexure FA3 of the Founding Affidavit.
- [3] See annexure FA 6 of the Founding Affidavit.
- [4] The evidence established that this Nancy was the same Nancy Makungo who gave evidence at the hearing.
- [5] See page 2 of the Investigation Report
- [6] In her answering affidavit Ms Matsangu stated that the Inspector had intimidated Ms Makungo into providing access to the fries of the Respondent.
- [7] 1998 ZACC 10, 1998(4) SA 1127 CC
- [8] 2000 (1) SA 257
- [9] Section 163 states that a credit provider must ensure that its employees or agents are trained in respect of the matters to which
this Act applies.
- [10] See for example in the case of consumer files C1, C2 and C3 attached to the Founding Affidavit.
- [11] See in the case of Nemadodzi {C6} where he agreed that if he failed to repay the full sum of R14 300 on or before 15 January 2013 he would be liable to pay 15 instalments of R1000 per month, the first instalment to commence on the date of the implementation of an emoluments attachment order. The letter of demand for payment (which is signed by him)

is dated 18 January 2013 and he acknowledges having received a notice in terms of section 129 of the NCA which is signed on 4 March 2013. A consent to judgment is dated 12 March 2013 and a consent to jurisdiction form is dated 22 March 2013. It seems from the evidence before the Tribunal that on the balance of probabilities Mr Nemaododzi signed these documents at the time when he obtained the loan and not at the time when the Respondent was seeking to reclaim payment.

[12] See attachments to the Inspector's Report and the Founding Affidavit. For example C1 (Mulaudzi) contains three emolument attachment orders {EAOs) dated 30 July 2014, 4 March 2015 and 4 June

2015. The file also contains an undated and uncompleted but signed

{by the consumer) letter of demand in terms of section 56 of the Magistrate's Court Act and an undated and uncompleted but signed (by the consumer) notice in terms of section 129 of the NCA. The file also contains an uncompleted and undated loan application which is signed by the consumer. The only information in this loan application are personal details regarding her name, address,

employer, income and her Persal number. No details regarding the loan are provided. Similar undated and blank documents are to be found in C2 (Mudai) which also contains two undated but signed consent to judgment documents. In this instance the loan application

also included the amount of the loan which was for R5 000. There is no EAO in this case. In the case of C3 (Ramuntshi) an EAO was issued on 8 Jan 2015 and 5 May 2015 In favour of the Respondent. In the case of C4 (Selona) an EAO was issued on 27 February 2017 and 10 February 2017 in favour of the Respondent. Nemaododzi's file is marked C6. The documents indicate that he obtained a loan of R12 000 on 20 February 2012 and that he agreed to pay the lump sum of R14 300 being the capital deb interest and administration fees on or before 15 January 2013.

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Prepared on 11 October 2026 · Esheria